

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN DEWAYNE COOPER,

Defendant-Appellant.

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UNPUBLISHED

November 18, 2008

No. 278738

Wayne Circuit Court

LC No. 06-012981-01

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). We affirm, but remand for correction of defendant's judgment of sentence.

Defendant first argues that the prosecutor improperly excused an African-American juror from the jury pool. We disagree.

In *Batson v Kentucky*, 476 US 79, 87-88; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the Court mandated a three-step process to determine whether a peremptory challenge is based on purposeful discrimination in violation of the Equal Protection Clause. *Id.* at 96-100. The opponent of the peremptory challenge must first establish a prima facie case of racial discrimination. *Id.* at 96-97.

To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005) (internal citation omitted).]

If the first step is satisfied, the burden of production shifts to the proponent of the challenge to produce a race-neutral justification for excusing the jury member. *Batson, supra* at 97. Third, the trial court must determine whether the explanation is a pretext and whether the objecting party has proved purposeful racial discrimination. *Id.* at 100. See, also, *People v Bell*, 473 Mich 275, 278-279; 702 NW2d 128, amended 474 Mich 1201 (2005). The first step is a

mixed question of fact and law. *Id.* at 342. The factual findings are reviewed for clear error and the legal findings are reviewed de novo. *Id.* The second step is reviewed de novo. *Id.* at 344. Step three is a question of fact that is reviewed for clear error. *Id.*

At trial, defense counsel conceded that he could not prove a prima facie case that the prosecutor improperly exercised the peremptory challenge. Therefore, the issue is waived. *People v Adams*, 245 Mich App 226, 240; 627 NW2d 623 (2001). The first step in the three-step process to determine whether a peremptory challenge was based on purposeful discrimination was not met.

While our analysis need not continue from this point, we note that the trial court continued with its analysis and requested that the prosecutor provide a race-neutral justification for striking the jury member at issue. The prosecutor articulated that she thought the juror was having a hard time following questions, the juror appeared to constantly smile regardless of the context of the questioning, and the prosecutor thought the juror seemed unconcerned that someone shot at her house and was not caught, thus she may have a tolerance for crime. The trial court found that the prosecutor's explanation was suitable and the peremptory challenge was not racially motivated. We agree. The prosecutor provided three acceptable race-neutral reasons for the peremptory challenge. We give deference to the trial court's findings on the issue of discriminatory intent because the finding largely turned on the evaluation of the prosecutor's credibility. See *Hernandez v New York*, 500 US 352, 365; 111 S Ct 1859; 114 L Ed 2d 395 (1991). The best evidence will often be the demeanor of the prosecutor, and credibility lies within the province of the trial court. *Id.* We also note that the prosecutor did not use all of her peremptory challenges and ultimately accepted a jury that included an African-American juror, a circumstance that militates against a finding of purposeful discrimination. See *People v Williams*, 174 Mich App 132, 136-137; 435 NW2d 469 (1989). Defendant was not denied his rights under the Equal Protection Clause.

Defendant also argues on appeal that from the beginning of trial and continuing throughout, the prosecutor embarked upon a course of improper argument, which included her statement of personal opinion about defendant's guilt and personal attacks on defendant's character. Defendant further argues that his counsel was ineffective for failing to object or for offering only belated objections to the misconduct. When defense counsel fails to object to the prosecutor's challenged conduct and where objections are belated, we review the claims of error for plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004); *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). Defendant's conviction will be reversed only if a plain error affecting defendant's rights exists, and it is further determined that defendant is actually innocent, or the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," regardless of his innocence. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). "Further, [] [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context." *Thomas*, *supra* at 454.

Moreover, to establish ineffective assistance of counsel during trial, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Further, counsel is not ineffective for failing to make motions or objections that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant first asserts that the prosecutor launched into an argumentative personal attack on defendant's character during opening statements, and by not objecting, defense counsel failed to protect defendant's interests. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Opening statements are not evidence. *People v Bailey*, 451 Mich 657, 681; 549 NW2d 325, amended 453 Mich 1204 (1996). And, before opening statements, the trial court instructed the jury that the opening statements were not evidence and were only meant to help the jury understand how each side viewed the case. The prosecutor specifically indicated during opening statements that it was important for the jury to know the context in which to place defendant's actions and to understand the relationship between the victim and defendant. The prosecutor additionally indicated that her comments related to what the evidence is going to show. The prosecutor's challenged statements considered in context were not improper.

Defendant also argues that the prosecutor made improper and personal character attacks upon defendant during closing argument, and defense counsel's failure to object cannot be deemed trial strategy. "[P]rosecutors should not . . . express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing arguments will be reviewed in context to determine whether they constitute error requiring reversal." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, prosecutors are accorded great latitude regarding their arguments and conduct during trial. *Id.* A prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger, supra* at 236; see, also, *Bahoda, supra* at 282. A prosecutor may also argue from the facts that a witness is credible or that a witness is not worthy of belief. *Unger, supra* at 240. "The credibility of a witness is always an appropriate subject for the jury's consideration." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

In *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), defendant argued that the prosecutor improperly characterized him as a liar during closing argument. The Court held that a prosecutor may argue from the facts that the defendant is not worthy of belief. *Id.* This is similar to the facts in this case because the prosecutor argued that defendant is not worthy of belief. The prosecutor's theory of the case was also that defendant was controlling and manipulative and lied about the status of his relationship with the victim as well as many other things. The prosecutor's challenged argument questioned defendant's credibility in light of the

evidence and reasonable inferences. Because a prosecutor is not required to use the blandest possible language in arguing the facts and inferences, *Unger, supra* at 239, we find no prosecutorial misconduct requiring reversal.

There was no plain error in the prosecutor's comments during opening statements or closing arguments. Further, any prejudice flowing from the prosecutor's remarks was mitigated by the instructions that the jurors "may only consider the evidence that has been properly admitted in this case"; that the "lawyers' statements and arguments are not evidence"; that "[y]ou should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge"; and, "[y]ou should use your own common sense and general knowledge in weighing and judging the evidence" and "rely on your own common sense and everyday experience." See *Bahoda, supra* at 281; see, also, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *Unger, supra* at 235. There exists no prosecutorial misconduct. As such, an objection by defense counsel would have been futile, and counsel is not required to make futile objections. *Milstead, supra*. Defendant has not met his burden of demonstrating that defense counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Toma, supra*.

Defendant also argues that there was prosecutorial misconduct, and his counsel should have objected, when the prosecutor questioned the victim's sister about a telephone call in which the victim said "I don't expect you to come over here. I just wanted you to know if something happened to me, Steve Cooper did it." The sister testified that the victim seemed frightened, terrified and excited. Therefore, the testimony was admissible as an excited utterance. MRE 803 (2). The evidence was admissible and prosecutorial misconduct cannot be predicated on a prosecutor's good faith effort to admit evidence. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Consequently, there was no plain error. Any objection to the admission of the challenged testimony would have been futile. Thus, defendant cannot demonstrate that his counsel was ineffective for failing to object. See *Milstead, supra*. Further, we note that defense counsel further sought to protect defendant's rights by moving for a mistrial and the admission of this testimony as one of the reasons for the mistrial. Defense counsel's performance was not objectively unreasonable.

Defendant also asserts prosecutorial misconduct and ineffective assistance of counsel based on the trial court's questioning of the victim's sister about the locks at the victim's home. The victim's sister responded to the questioning, without objection, and in doing so, stated that defendant previously bound, gagged, and left the victim for dead. The challenged testimony was the result of the seemingly innocuous questioning by the trial court, not the prosecutor. Thus, we find that the prosecutor did not plainly err with respect to the challenged testimony.

We additionally note that this testimony was admissible because it showed scheme, plan, or system in doing an act. MRE 404(b)(1); *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007). Evidence of other crimes, wrongs, or acts is admissible if offered for a

proper purpose under MRE 404(b)(1), if relevant, and if the probative value of the evidence is not substantially outweighed by unfair prejudice. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003). The challenged testimony was that defendant previously bound, gagged, and left the victim for dead, and the testimony relating to the victim's murder also indicated that the victim was bound, gagged, and left for dead. Thus, the prior bad-act testimony shared common features with the crime testimony, and established a common plan, scheme, or system relating to defendant's conduct with the victim. As such, it was admissible for a proper purpose under MRE 404(b).

This evidence was also relevant, tending to make it more probable than not that the conduct, which led to the victim's murder, occurred at the hands of defendant. The testimony that the victim was gagged, bound, and left for dead by defendant on a previous occasion was highly probative under the circumstances, and the probative value was not substantially outweighed by the danger of unfair prejudice at trial. See *Starr, supra* at 499-500. Because the evidence was admissible, an objection by defense counsel would have been futile. Counsel is not ineffective for failing to make futile objections. *Milstead, supra* at 401. Moreover, the record indicates that instead of objecting to the testimony, defense counsel sought to protect defendant's rights by moving for a mistrial, arguing in relevant part that he was not provided with an MRE 404(b) notice of the prosecutor's intent to admit other bad-acts evidence. The trial court denied defendant's motion. Effective assistance of counsel is presumed and defendant has not met his heavy burden of proving otherwise where the challenged evidence was admissible and defense counsel nevertheless sought a mistrial based on it. See *Solmonson, supra*.

Defendant further asserts both prosecutorial misconduct and ineffective assistance of counsel related to the prosecutor's questioning of Sergeant LaNesha Jones about the statement given by the victim's sister to police. The prosecutor asked Sergeant Jones whether the sister's first statement to police contained the same information testified to at trial, and whether the trial testimony was not something "cooked up" later. Contrary to defendant's argument, the prosecutor was not asking Sergeant Jones to comment on the credibility of the victim's sister. Rather, the prosecutor was properly eliciting testimony to enable the jury to assess the credibility of the victim's sister. "The credibility of a witness is always an appropriate subject for the jury's consideration." *Coleman, supra*. There was no plain error with respect to the prosecutor's question, and consequently, an objection by defense counsel was not appropriate and would have been futile. Thus, defense counsel's performance did not fall below an objective standard of reasonableness and was not ineffective. See *Milstead, supra*.

Defendant next challenges the prosecutor's questioning of a witness about U-Haul records and defense counsel's ineffectiveness for only providing a belated objection to the testimony. We agree the challenged testimony is hearsay, MRE 801(a), and inadmissible, MRE 802. However, nothing in the record supports that the prosecutor was deliberately trying to admit improper evidence in bad faith. Thus, defendant cannot show prosecutorial misconduct. See *Dobek, supra*. The prosecutor was attempting to show that defendant lied when he claimed he rented a U-Haul truck with the victim. Even if improper, there was overwhelming evidence of defendant's guilt. Consequently, there was no plain error affecting defendant's substantial rights.

And, although defense counsel did not immediately object to this line of questioning, he did object and prevent further testimony on this issue. Moreover, if defense counsel objected sooner, the prosecutor may have decided to admit rental records of the U-Haul company in order for this information to be provided to the jury. Defense counsel may have decided to allow some hearsay evidence on the issue to avoid the more substantive proof. Defense counsel aptly minimized the probative value of the testimony by eliciting testimony from the witness that the witness (1) only checked for a rental in defendant and the victim's name and did not request a search in any other name that may have been used by defendant or the victim, (2) did not provide the U-Haul employees with the proper spelling of the victim's name, and (3) did not know what spelling the U-Haul employees used in their search. In addition, defense counsel emphasized during closing arguments that \$75 was spent at a Marathon gasoline station; therefore, supporting defendant's testimony that he purchased gasoline for the U-Haul truck. Defendant has not demonstrated that trial counsel's handling of the evidence fell below an objective standard of reasonableness. See *Toma, supra*.

Defendant further asserts that the questioning of Sergeant Jones by the prosecutor, which related to defendant's post-*Miranda* silence, constitutes prosecutorial misconduct, and that his counsel was ineffective for not objecting sooner.

In *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), the United States Supreme Court held that the use of a criminal defendant's silence "at the time of arrest and after receiving *Miranda* warnings" for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. [*People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001).]

In *Doyle*, the prosecution repeatedly asked each defendant while testifying why he did not provide an exculpatory version of events to the police after he was arrested. *Dennis, supra* at 575. The Court reversed defendants' convictions because the prosecutor used the defendants' post-*Miranda* silence against them. *Id.* at 574.

However, our courts have subsequently determined that such references do not always warrant reversal. *Dennis, supra* at 575. In *Greer v Miller*, 483 US 756; 107 S Ct 3102; 97 L Ed 2d 618 (1987), the defendant testified at trial and provided an exculpatory version of events. *Dennis, supra* at 576. On cross-examination, the prosecutor asked why defendant did not tell the exculpatory version at the time of his arrest. *Id.* Defense counsel immediately objected, the trial court sustained the objection, and the trial court instructed the jury to ignore the question. *Id.* During its jury instructions, the trial court indicated that the jury should disregard questions where the objection was sustained. *Id.* The *Greer* Court held that despite the improper question by the prosecutor, no *Doyle* violation occurred. *Id.* Similarly, in *Dennis, supra* at 575, 578, 583, this Court found no *Doyle* violation where the offending testimony was nonresponsive and isolated, and there was "no attempt to use his prior silence for impeachment purposes." Moreover, the trial court gave a forceful curative instruction to the jury that defendant saying he wanted a lawyer and did not wish to talk with the officer "'cannot be used by you in any way and is not an indication of anything.'"

“While a single, inadvertent reference to *post-Miranda* silence may not amount to constitutional error, deliberate ‘use’ of this evidence against a defendant does.” *People v Shafier*, 277 Mich App 137, 140; 743 NW2d 742 (2007), lv gtd 480 Mich 1193 (2008). In *Shafier*, the prosecutor’s reference to defendant’s *post-Miranda* silence was not inadvertent and the references were numerous throughout the trial. *Id.* at 141-142. Regardless, the Court held:

defendant has not established plain error affecting his substantial rights. While we acknowledge that the prosecutor's use of defendant's *post-Miranda* silence here was arguably more extensive and deliberate than comparable cases in which Michigan appellate courts have declined to find that similar breaches of *Miranda* affected the outcome of the proceedings below, in light of the other evidence of defendant's guilt of second-degree criminal sexual conduct, we conclude that defendant has not demonstrated that the prosecutor's erroneous questions and comments regarding his *post-Miranda* silence affected the outcome of the lower court proceedings. [*Id.* at 143-144.]

In the case at bar, the prosecutor specifically asked several questions relating to defendant’s *post-Miranda* silence. This was improper. However, defense counsel objected and the trial court clearly indicated that the jury should disregard the last line of questioning and that defendant had an absolute right to remain silent and not give any statement. Although defense counsel’s objection was belated, any error was cured by the trial court. Consequently, we conclude that defendant’s *post-Miranda* silence was not submitted to the jury as evidence from which to draw any permissible inference. The impropriety did not rise to the level of a due process violation and thus does not warrant a reversal of defendant’s convictions.

In reaching our conclusion, we find that defense counsel was not ineffective. Defense counsel asked that the attorneys be allowed to approach the judge during the questioning, and the trial court subsequently indicated on the record that the jury should disregard the last line of questioning and that defendant has an absolute right to remain silent and not give any statement. The result of an objection for an improper remark by a prosecutor is the issuance of a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *Abraham, supra*. Counsel’s performance cannot be said to have fallen below an objective standard of reasonableness but for which the results of defendant’s trial would have been different.

Finally, defendant challenges the prosecutor’s cross-examination of defendant about a 1990 conviction. Defense counsel did not object, but the trial court cured the prosecutor’s error by instructing the jury to disregard the question and answer. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *Id.* There was no plain error requiring reversal. Moreover, because defendant received the same relief he would have received if defense counsel objected, there is not a reasonable probability that the results of defendant’s trial would have been different. Consequently, defendant has not effectively established his claim of ineffective assistance of counsel.

Defendant’s final argument on appeal is that he was wrongly convicted and sentenced on counts of first-degree premeditated murder and first-degree felony murder, both for the death of

a single individual. We agree. When a defendant is convicted of first-degree premeditated murder and first-degree felony murder for a single homicide, in order to avoid double jeopardy implications, the defendant should receive one conviction for first-degree murder, supported by two theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006); *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Therefore, defendant's judgment of sentence should be modified to specify that defendant was convicted and sentenced for one count of first-degree murder supported by two theories.

Affirmed, but remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter